



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 92 OF 2016**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**DAVID KINYUA GACHOI.....ACCUSED**

**RULING**

[1] The accused, herein DAVID KINYUA GACHOI, was charged with the offence of murder contrary to Section 202 as read with Section 205 of the Penal Code CAP 63. The particulars of the offence being that on the 17<sup>th</sup> Day of December 2016 at Kamukara village, Kagiju sub-location, Rwanyange location within Meru County, unlawfully killed Stella Gaitithiru.

[2] The prosecution and the accused commenced plea bargain negotiations which yielded a plea agreement on 2<sup>nd</sup> Day of May 2017. It was agreed between the parties that the Accused pleads to the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The said plea agreement was filed in and was accepted by the court. However, questions abound, on whether facts disclosed; (1) amounted to a defence of self-defense; and or (2) supported the charge. The appropriateness of the charge in the circumstances of the case was in controversy. As a result, the court directed the State Counsel to submit on these issues before the accused could take plea on the negotiated charge. Gladly, the following was submitted.

[3] Mr. Namiti, Learned Counsel of the State submitted that they took the route of manslaughter because postmortem was not conducted and that there were elements of provocation as indicated by the facts stated.

[4] Mr. Munene, Learned Counsel for the Accused submitted that the agreement states the chain of events which discloses self-defense on the part of the accused- which is a good defence in law. He took the view that, in the circumstances, the Accused should be given the benefit of being discharged. He stated that provocation was present and the Deceased pursued the Accused and hit him severally. He did not intend to cause any death.

**DETERMINATION**

[5] Plea bargain and agreements are now integral part of our criminal law. It is specifically provided for in Section 137(A-O) of the Criminal Procedure Code. The plea negotiation involves the prosecution, victims and the accused. The accused person must be engaged in the process fully and conscientiously. He must also understand the terms of the plea agreement, accept those terms and sign it voluntarily. A plea agreement would entail a reduction of a charge to a lesser one or withdrawal of the charge or a stay of other charges or a promise not to proceed with other possible charges. The plea agreement should therefore be in writing and signed by the prosecution and the accused person or his legal representative. The accused ought to be made aware of the rights he waives when he accepts the agreement.

[6] The court does not participate in the plea negotiations. But, any agreement must be filed in court and the court may accept or reject a plea agreement. See section 137H and J of the CPC. Therein lies court's major constitutional role. Of specific relevance to this case is Section 137H of the CPC which states that:

***“(1) Where the court accepts a plea agreement –***

***(a) it shall enter the factual basis of the plea on record;***

***(b) the agreement shall become binding upon the prosecutor and the accused;***

***(c) the agreement shall become part of the record of the court.***

***(2) Where a plea agreement entered into in accordance with section 137A (1) (a) is accepted by the court in accordance with this section, the court shall proceed to convict an accused person accordingly.”***

[7] According to the foregoing provision, in entering or upon or before entering the factual of a plea agreement on record, nothing prevents the court from receiving any submissions on the factual basis of the plea agreement before conviction on the negotiated plea. And if it be shown that the factual basis is at variance with the charge or does not support the charge or discloses a legally sanctioned defence, the court shall accordingly deal with the situation as the case may be. The court may reject the plea agreement or order for appropriate charge to be filed or order amendment or alteration of or substitution of charge or discharge the accused as the case may be.

[8] The Prosecution stated that they took the route of a lesser charge of manslaughter because postmortem was not conducted and that there was element of provocation. The Accused states that it was self defence and should be given the benefit of being discharged.

[9] I am aware that lack of medical evidence, in this case, a postmortem, does not mean that a person cannot be charged and convicted on a charge of murder. See what SPRY JA stated in the case **WAHIIH & ANOTHER VS UGANDA (1968) EA 278** that:

*‘There have been cases in East Africa where persons have been convicted of murder although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where the medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death.*

But, the prosecution may as well prefer plea negotiation as a way prudent prosecution. Therefore, I have no quarrel with the course taken. What about the disclosed factual basis?

[10] The factual basis stated in the plea agreement and which the prosecution has admitted in their submission is that the accused acted in self-defence and out of provocation. The following facts were stated in the plea agreement;

*On 17<sup>th</sup> December 2016 at Kamukara village, Kagiju sub-location, Rwanyange Location within Meru County, at 9.00 a.m. the accused, his wife Agnes Kathure and cousin Moses Gituma were seated outside the accused’s house.*

*It is at this time that the deceased, who was an aunt to the accused and another to Moses Gituma, arrived home and found the trio seated outside the accused person’s house. When she saw the trio, she started referring to them as killers and told them that they will be arrested in a few minutes. She then walked to her house. The accused followed her and on reaching her house, he asked her why she was calling them killers.*

*Enraged by the accused person’s question, the deceased picked a cup of “Mugacha”, a local brew, and splashed it on the accused person’s face. The accused ran around the deceased’s house wiping his face. The deceased picked a panga and started chasing the accused while hitting him with the flat side of the panga. The accused managed to escape through a hole in the kitchen wall but the deceased continued to chase him around the compound.*

*In self-defence, the accused picked a piece of wood and hit the deceased on the head. She fell down but rose up after a few minutes and went back to the house. She then opened the door and left for the home of the Sub-area to report what had unfolded after about two minutes. But before reaching the sub-areas’s home she fell down.*

*Word of the deceased’s predicament reached the sub-area. He rushed to the scene and found the deceased lying beside the road with mucus and saliva oozing out of her nose and mouth respectively. The sub-area asked Moses to rush his mother to hospital. He rushed her to Chaaria Mission Hospital. She was admitted but around 6.00 p.m she passed on.. On receiving this information, the accused took off to Tigania frp, where he was arrested on 19<sup>th</sup> December, 2016 and escorted to Meru Police Station. The accused pleads to the lesser charge of manslaughter contrary to Section 202 as read with section 205 of the Penal Code.*

#### **Principles on self-defence**

[11] In the case of **TEI S/O KABAYA vs. REPUBLIC [1961] EA** the court held:-

*“In consideration whether the defence of provocation was sufficient to reduce the offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used.”*

[11] Section 17 of the Penal Code is useful in relation to defence of a person or property and provides that:

*“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”*

[12] What are these common law principles on self-defence? This question was asked and answered by the Court of Appeal in the case of **Mohammed Omar & 5 Others [2014] eKLR** as follows:

*“What are the common law principles relating to self-defence? The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in **PALMER VS R [1971] AC 818**. The decision was approved and followed by the Court of Appeal in **R VS McINNES, 55 Lord Morris, delivering the judgment of the Board, said:***

*“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that*

he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ....Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. .... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

### Applying the principles

[13] The Accused was attacked by the deceased with a panga, and in self-defence, the accused hit her with a piece of wood. The deceased fell down and was rushed to hospital where she died thereafter. In consideration of presence of provocation, the parties agreed that the accused be charged with a lesser charge; manslaughter. Therefore, the charge is appropriate.

### Accused seeking discharge

[14] Section 205 of the Penal Code states that the punishment of manslaughter is imprisonment for life. Under the plea agreement the Accused has acknowledged the penalties as:

*“ The accused understands that, based on his plea of guilty, he will be subject to*

*(a) Any maximum possible penalty, including imprisonment, fine, community service order, probation or conditional or unconditional discharge*

*(b) Any mandatory maximum penalty*

*(c) Any applicable forfeiture*

*(d) The court’s authority to order compensation under section 175(2) (b) of the CPC*

*(e) Restitution under section 177 of the CPC, or both under CAP 75*

*(f) The prosecution’s right, in the case of prosecution for perjury or false statement, to use against the accused any statement that the accused gives in the agreement*

*(g) That by entering into a plea agreement, he is waiving the right to appeal except as to the extent or legality of sentence.”*

[15] The Accused sought for unconditional discharge based on the defence of self-defence. Here, I find it profitable to cite the case of **Morris Mungathia v Republic [2007] eKLR** where the Court of Appeal held that:

*“It would appear to us that the duty of an accused person facing a murder charge who relies on the defence of self-defence is to lay before the Court facts upon which the defence is based. The whole purpose of doing so is to enable the court and the prosecution to understand the basis of such a defence. He assumes no responsibility of establishing that defence. The prosecution, however, has the onus of showing that the appellant was not acting in self-defence and that there was time and opportunity before the fatal blow to retreat. (See **MANZI MENGI V. R [1964] EA. 28**”*

Onus is on the prosecution to show that an accused was not acting in self-defence; and the same principle applies to a charge of manslaughter where an accused person relies on the defence of self-defence.

[16] Now, therefore, taking all factors into consideration, the accused was charged with manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. However, based on the factual basis of the plea agreement filed herein and accepted by the court, I find and hold that the accused had acted in self-defence. He did not use any more force than was reasonably necessary or appropriate in the circumstances. He was being chased and hit by a panga. The one blow inflicted by use of a piece of wood to defend himself was not disproportionate. He is entitled to unconditional discharge. Accordingly, the accused is discharged unconditionally. He shall be set free forthwith unless he is otherwise lawfully held in custody. It is so ordered.

**Dated, Signed and delivered in open court at Meru this 5<sup>th</sup> day of April, 2018.**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

**Mr. Kiarie advocate for State**

**M/s. Mbiyiwe advocate for Mr. Munene for accused**

**Accused - present**

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**F. GIKONYO**

**JUDGE**